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No. 92-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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AMICUS CURIAE BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus curiae Product Liability Advisory Council, Inc. will address the following issue:

Does an award of punitive damages made in the absence of the procedural safeguards approved by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), and in the absence of alternative procedural safeguards providing substantially equivalent protection against arbitrary and capricious punishment, violate the defendant's procedural due process rights?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. WEST VIRGINIA HAS IMPERMISSIBLY UPSET THE HISTORICALLY APPROVED AND CONSTITUTIONALLY REQUIRED BALANCE BETWEEN DEFENDANTS' INTEREST IN RATIONAL DECISIONMAKING AND THE STATES' INTEREST IN ENSURING APPROPRIATE PUNISHMENTS	4
A. Due Process Requires States to Preserve the Historically Approved Balance	4
B. West Virginia Has Upset the Historically Approved Balance	8
1. Punitive Damages Proceedings at Common Law Provided Substantial Protection Against the Infliction of Arbitrary, Discriminatory, and Excessive Punishment	8
2. Punitive Damages Proceedings in West Virginia Depart Significantly from the Common-Law Approach	10
3. Punitive Damages Proceedings in Other States Depart Significantly from the Common-Law Approach	13
4. The Numerous Departures from the Common-Law Approach to Punitive Damages Have Upset the Historically Approved Balance Between the Respective Interests of Defendants and the States	14

TABLE OF CONTENTS—Continued

	Page
C. Unlike the Alabama Punitive Damages Approach Approved in *Haslip*, the West Virginia Approach Fails to Provide Procedural Safeguards Necessary to Cure the Imbalance Caused by the Modern Departures from the Common-Law Approach	24
II. DUE PROCESS REQUIRES THAT WEST VIRGINIA PROVIDE PROCEDURAL SAFEGUARDS AT LEAST EQUIVALENT TO THOSE APPROVED IN *HASLIP* IN ORDER TO RESTORE THE HISTORICALLY APPROVED BALANCE BETWEEN DEFENDANTS' INTEREST IN RATIONAL DECISIONMAKING AND THE STATES' INTEREST IN APPROPRIATE PUNISHMENT	26
Jury Proceedings	28
Trial Court Review	29
Appellate Review	30
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
Berger v. Weber, 411 Mich. 1, 303 N.W.2d 424 (1981)	14
Bliskey v. Berry Property Management, Inc., 34 A.T.L.A. Law Reporter 354 (Tex. Dist. Ct. May 16, 1991)	24
Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743 (Tex. 1980)	15
Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981)	15
Caldwell v. New Jersey Steamboat Co., 47 N.Y. 282 (1872)	10
Carter v. Massey-Ferguson, Inc., 716 F.2d 344 (5th Cir. 1983)	15
City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981)	17, 21
Coryell v. Colbaugh, 1 N.J.L. 90 (1791)	8
Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969)	18
Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968)	13-14
Downie v. United States Lines Co., 359 F.2d 344 (3d Cir.), *cert. denied*, 385 U.S. 897 (1966)	13
Duncan v. Record Publishing Co., 145 S.C. 196, 143 S.E. 31 (1927)	10
Flores v. Kings Park Apartments, 34 A.T.L.A. Law Reporter 190 (Tex. Dist. Ct. Nov. 9, 1990)	24
General Chem. Corp. v. De la Lastra, 815 S.W.2d 750 (Tex. Ct. App. 1991)	23
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	13
Glasscock v. Armstrong Cork Co., 946 F.2d 1085 (5th Cir. 1991)	23
Green v. Bittner, 85 N.J. 1, 424 A.2d 210 (1980)	14
Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979)	6
Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986)	26
Hannah v. Larche, 363 U.S. 420 (1960)	6

TABLE OF AUTHORITIES—Continued

	Page
Havner v. Merrell Dow Pharmaceuticals Inc., 19 Prod. Safety & Liab. Rep. (BNA) 1134 (Tex. Dist. Ct. Oct. 3, 1991)	23-24
Huckle v. Money, 95 Eng. Rep. 768 (C.P. 1763)	8
Lemon v. Missouri Pac. R.R., 34 A.T.L.A. Law Reporter 229 (Tex. Dist. Ct. Feb. 7, 1991)	24
Livesley v. Stock, 281 P. 70 (Cal. 1929)	10
Lopez v. Westinghouse Elec. Corp., 19 Prod. Safety & Liab. Rep. (BNA) 862 (Tex. Dist. Ct. July 31, 1991)	24
Mathews v. Eldridge, 424 U.S. 319 (1976)	27, 28
Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991)	14
McGautha v. California, 402 U.S. 183 (1971)	6
McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967)	14, 18
Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980)	13
Morrissey v. Brewer, 408 U.S. 471 (1972)	6
Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1856)	5
Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991)	*passim*
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Price v. Price, 732 S.W.2d 316 (Tex. 1987)	18
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Schall v. Martin, 467 U.S. 253 (1984)	6
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Simmons v. State Farm Fire & Casualty Co., 34 A.T.L.A. Law Reporter 306 (Tex. Dist. Ct. Mar. 1, 1991)	24
Smith v. Wade, 461 U.S. 30 (1983)	9
State Farm Mut. Auto. Ins. Co. v. Zubiate, 808 S.W.2d 590 (Tex. Ct. App. 1991)	23

TABLE OF AUTHORITIES—Continued

	Page
Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967)	23
Twining v. New Jersey, 211 U.S. 78 (1908)	6
TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870 (W. Va. 1992)	10, 11, 12
Waite v. Dean Witter Reynolds, Inc., 34 A.T.L.A. Law Reporter 66 (Tex. Dist. Ct. Aug. 3, 1990)	24
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Ward v. Exxon Corp., Texas Lawyer, No. 26, 1990, p. 16 (Tex. Dist. Ct. Nov. 5, 1990)	24
Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. 1763)	8

STATUTES AND RULES

Fed. R. Evid. 408	20
W. Va. Code § 61-3C-4 (Michie 1992)	11
W. Va. R. Evid. 408	20
Tex. Civ. Prac. & Rem. Code Ann. § 101.025 (West 1993)	18
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TABLE OF AUTHORITIES—Continued

	Page
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Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 Yale L.J. 319 (1957)	7
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Restatement (Second) of Torts (1964)	15
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TABLE OF AUTHORITIES—Continued

	Page
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INTEREST OF AMICUS CURIAE

Product Liability Advisory Council, Inc. ("the Advisory Council") is an association of industrial companies that was formed for the principal purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability. Its members, together with other corporations doing business in this country, have borne the brunt of the massive and

discriminatory increase in punitive damages verdicts that has occurred in the last two decades and that this Court's decision in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), has not succeeded in stemming.[1]

Researchers for the RAND Institute for Civil Justice have concluded that "[c]orporate defendants are in fact more likely than individuals or public agencies to be the target of [punitive damages] awards" and that "[p]unitive [damages] awards against businesses were far larger than those against individuals in both personal injury and business/contract cases." M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings iii*, 50 (1987). "[J]uries also award more money when the defendants are institutions or organizations rather than individuals—the 'deep-pocket' effect . . . . [W]e can detect a separate, statistically independent effort for deep-pocket defendants, even in cases that do not involve products or malpractice." D. Hensler, M. Vaiana, J. Kakalik, M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 21 (1987).

The Advisory Council and its members therefore have a particular interest in ensuring that this Court is fully informed about the features of modern punitive damages proceedings, such as West Virginia's, that fundamentally distinguish them from historical common law proceedings and that have generated the arbitrariness, discrimination, and excessiveness that have come to characterize punitive damages proceedings in the last 20 years. The Advisory Council also has an interest in ensuring that this Court is fully informed about the nature of the procedural safeguards that are needed to reduce to a constitutionally allowable level the risk of such improper punishment.

[1] Consent letters have been filed with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although due process requires no particular procedure for a punitive damages award to be made, the proceedings in which such punishment is inflicted must preserve within reasonable bounds the fundamental balance that historically obtained between defendants' "interest in rational decisionmaking and [the states'] interest in meaningful individualized assessment of appropriate deterrence and retribution." *Haslip*, 111 S. Ct. at 1044. West Virginia has chosen in recent years to adopt numerous substantive, procedural, and evidentiary rules that depart significantly from those which governed punitive damages proceedings both at common law and when the Due Process Clause of the Fourteenth Amendment was added to the Constitution.

Those departures from the historically approved approach to punitive damages have fundamentally increased the risk of arbitrary, discriminatory, and excessive punishment, and West Virginia has failed to provide offsetting procedural safeguards, such as those approved by this Court in *Haslip*, to preserve substantially the level of protection that was provided at common law against arbitrary, discriminatory, and excessive punitive damages. Such procedural safeguards, or their substantial equivalent, are necessary to restore the balance that historically existed, that is constitutionally required, and that this Court has emphasized, between punitive-damages defendants' interest in rational decisionmaking and the states' interest in appropriate individualized punishment.

ARGUMENT

I. WEST VIRGINIA HAS IMPERMISSIBLY UPSET THE HISTORICALLY APPROVED AND CONSTITUTIONALLY REQUIRED BALANCE BETWEEN DEFENDANTS' INTEREST IN RATIONAL DECISIONMAKING AND THE STATES' INTEREST IN ENSURING APPROPRIATE PUNISHMENTS

A. Due Process Requires States to Preserve the Historically Approved Balance

In *Haslip*, upon reviewing "the traditional common-law approach" that had been used "for two hundred years" in awarding punitive damages, this Court concluded, "[W]e cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional." *Id.* at 1043. The Court defined the "traditional common-law approach" as that in which "the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable." *Id.* at 1042.

Justice Scalia, concurring in the judgment, similarly observed that "it has been the traditional practice of American courts to leave punitive damages (where the evidence satisfies the legal requirements for imposing them) to the discretion of the jury." *Id.* at 1047 (Scalia, J., concurring in the judgment). He then concluded that, "[s]ince jury-assessed punitive damages are a part of our living tradition that dates back prior to 1868, I would end the suspense and categorically affirm their validity." *Id.* at 1054. Justice Kennedy, also concurring in the judgment, likewise concluded that "[j]ury determination of punitive damages has such long and principled recognition as a central part of our system that no further evidence of its essential fairness or rationality ought to

be deemed necessary." *Id.* at 1055 (Kennedy, J., concurring in the judgment).

Amicus Advisory Council has no quarrel with any of those affirmations of the constitutionality of "the traditional common-law approach," *as that approach is described in the Haslip opinions.* Rather, *amicus* submits that the approach to punitive damages followed by the West Virginia courts below is in important respects *not* the traditional common-law approach and therefore cannot be upheld on the basis of historical usage and approval. As *Haslip* recognized, the core question then becomes whether the approach in question "reasonably accommodated [the defendant's] interest in rational decisionmaking and [the state's] interest in meaningful individualized assessment of appropriate deterrence and retribution." 111 S. Ct. at 1044. That is, if West Virginia has chosen to depart in substantial ways from the historically approved common-law approach, has it done so in a manner that impermissibly increases the risk of arbitrary or discriminatory decisionmaking without also introducing offsetting procedural safeguards that reasonably preserve the approved historical balance?

Like the majority, both opinions concurring in the judgment in *Haslip* implicitly acknowledge that the due process inquiry requires more than the simple question of whether the punitive damages system being challenged provides for an exercise of jury discretion. Justice Scalia cited the principle that "we must look to settled *usages and modes of proceeding* existing in the common and statute law of England, before the emigration of our ancestors . . . ." *Id.* at 1049 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 276-77 (1856)) (emphasis added). Similarly, he cited the rule that due process "is met *if the trial is had according to the settled course of judicial proceedings.*" *Id.* at 1050, quoting *Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1876) (emphasis added by Scalia, J.). Still further, he articu-

lated the principle that, "consistently with the requirements of due process, *no change* in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, *and guard him against the arbitrary action of government.*" *Id.* at 1050 (quoting *Twining v. New Jersey*, 211 U.S. 78, 101 (1908)) (emphases in original deleted; emphasis added).

Similarly, Justice Kennedy stated, "This is not to say that every award of punitive damages by a jury will satisfy constitutional norms. A verdict returned by a biased or prejudiced jury no doubt violates due process." *Id.* at 1055. To determine whether adequate protection against such bias or prejudice existed, he indicated that courts should determine whether "the usual protections" have been provided. *Id.* at 1054-56.

These expressions are particularized restatements of the fundamental due process principle that the procedures required to guard against the risk of arbitrary or discriminatory deprivations vary "according to specific factual contexts," *Hannah v. Larche*, 363 U.S. 420, 442 (1960), and "not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "As long as the discretion [in punitive damages proceedings] is exercised within reasonable constraints," as informed by the historically approved balance, "due process is satisfied." *Haslip*, 111 S. Ct. at 1044, citing *Schall v. Martin*, 467 U.S. 253, 279 (1984); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 16 (1979); *McGautha v. California*, 402 U.S. 183, 207 (1971).

The due process clause could not sensibly require any less. If a state could *per se* satisfy due process merely by having punitive damages determined by a jury exercising its discretion, a state could merely provide a jury and at the same time take away every safeguard historically

provided against unjust punishment by juries. For example, under such a theory a state could put the burden on the defendant to prove that he did *not* commit the allegedly wrongful act, put the burden on the defendant to prove beyond a reasonable doubt that punishment in the form of punitive damages should *not* be inflicted, authorize punishment in the form of punitive damages for mere negligence or even without fault, establish various presumptions against the defendant, and make dozens of additional substantive, procedural, and evidentiary changes that were historically unheard of and that greatly increase the risk of arbitrary, discriminatory, or excessive punishment.

The factual questions to be answered, therefore, are whether the punitive damages approach followed by the West Virginia courts below differs from the common-law approach and, if so, whether the differences substantially alter, to defendants' detriment, the fundamental balance between defendants' interests and the states' interests and require offsetting procedural safeguards. *See generally* Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 Yale L.J. 319 (1957); Reich, *Mr. Justice Black and the Living Constitution*, 76 Harv. L. Rev. 673, 742-43 (1963) ("One of the chief concerns of the Constitution was to strike a lasting balance between the individual and the community . . . . Such a balance might be composed of very different elements at different times. It was and is a matter of proportion. The infant nation could grow to be a giant, but its organic balance must remain . . . . [I]t is the duty of judges to maintain that structure.") As shown below, the answers are affirmative.

B. West Virginia Has Upset the Historically Approved Balance

1. *Punitive Damages Proceedings at Common Law Provided Substantial Protection Against the Infliction of Arbitrary, Discriminatory, and Excessive Punishment*

English common law first approved of jury awards of punitive damages in 1763 in *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), and *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763). For more than a hundred years thereafter, "all of these cases [allowing punitive damages] share[d] one common attribute: they involved acts that resulted in direct affronts to the honor of the victims. The defendants' acts were insults that were likely to provoke reactions of outrage." Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 15 (1982). *See* K. Redden, *Punitive Damages*, § 2.2(A)(2) (1980).

Thus, punitive damages historically were awarded in England (a) for intentional torts, (b) against the individuals who actually committed the wrongful acts, (c) for wrongs that inflicted humiliation and emotional distress, and (d) in an era when compensatory damages for those forms of injury generally could not be recovered. *See* Ellis, *supra*, 56 S. Cal. L. Rev. at 14-18. Several of the early English cases explicitly justified punitive damages as both punishment and compensation for plaintiffs' intangible injuries. *See* K. Redden, *supra*, §§ 2.2(B) and 2.2(C); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 518-19 (1957).

In this country, too, punitive damages long were available only in a "comparatively small class of torts" (1 T. Street, *The Foundations of Legal Liability* 479 (1906)) —those involving what the earliest American decisions described as conduct "of the most atrocious and dishonorable nature." *Coryell v. Colbaugh*, 1 N.J.L. 90, 91 (1791). *See* R. Bauer, *Essentials of the Law of Damages* § 47 (1919). For the most part, these offenses were "dignitary torts" personally inflicted by one individual on another—primarily "the traditional intentional torts" such as assault, slander, seduction, and false imprisonment (*Symposium Discussion*, 56 S. Cal. L. Rev. 155, 156 (1982) (remarks of Prof. Ellis)), although by the last quarter of the nineteenth century, several courts had begun to speak not only of intentional wrongdoing, but in vague, ambiguous terms such as "malice," "wantonness," and "willfulness." *See* cases cited and discussed in *Smith v. Wade*, 461 U.S. 30, 38-46 (1983); *id.* at 68-84 (Rehnquist, J., dissenting). In any event, Pollock was able to summarize the law near the turn of the century by stating that "[t]he kind of wrongs to which [punitive damages] are applicable are those which, besides the violation of the right or the actual damage, impart insult or outrage . . . ." F. Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising From Civil Wrongs in the Common Law* 186 (1904). *See* T. Shearman & A. Redfield, *A Treatise on the Law of Negligence* § 600 (1869) (punitive damages reserved for "morally criminal" conduct).

With rare exceptions, punitive damages historically also were assessed only against individuals, the persons who actually inflicted the insult or harm. The exceptions seem to have arisen almost exclusively in actions against common carriers and public utilities, based on the theory that such defendants had assumed special obligations to the public, especially with respect to safety. *See* J. During, *The Law of Negligence* § 415 (1986); 2 S. Greenleaf, *A Treatise on the Law of Evidence* 263 n.a. (S. Croswell 14th rev. ed. 1983); 1 T. Sedgwick, *A Treatise on the Measure of Damages* § 371a (A. Sedgwick & J. Beale 9th rev. ed. 1912).

Moreover, the sums awarded as punitive damages were in the same range as were the fines set by statute for the type of conduct that gave rise to the punitive damages. It appears that the largest *combined* award of punitive and compensatory damages in the nineteenth

century was $20,000. *See Caldwell v. New Jersey Steamboat Co.*, 47 N.Y. 282, 283 (1872) (awarded to plaintiff passenger "maimed and crippled for life" by exploding steamboat boiler). Criminal fines were not substantially different. *See, e.g.*, F. Wharton, *A Treatise on the Criminal Law of the United States* (1852) (citing statutes) (fines for assault and battery ranging from $500-$3,000; fines for malicious mischief of up to $1,000; fines for seduction of up to $5,000).

As recently as 1930, Dean McCormick characterized verdicts of $50,000, $33,333.33 (reduced to $10,000), and $12,650 (reduced by $5,000) as "startlingly large verdicts of punitive damages." McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N.C. L. Rev. 129, 149 & n.114 (1930), citing *Duncan v. Record Publishing Co.*, 145 S.C. 196, 143 S.E. 31 (1927); *Livesley v. Stock*, 281 P. 70 (Cal. 1929); *Seaman v. Dexter*, 96 Conn. 334, 114 A. 75 (1921). In 1955 an award of $75,000 was the largest punitive damages verdict in California history and one of the two largest in the history of the United States. Levit, *Punitive Damages: Yesterday, Today and Tomorrow*, Ins. L.J., May 1980, at 257, 259 (1980).

In sum, until recently, common-law punitive damages were awarded for a narrow category of tortious conduct, in part as compensation, against wrongdoing individuals, and in modest amounts closely related to the criminal fines for similar conduct. *See Haslip*, 111 S. Ct. at 1066 (O'Connor, J., dissenting).

2. *Punitive Damages Proceedings in West Virginia Depart Significantly from the Common-Law Approach*

The punitive damages system applied below by the West Virginia courts differs in several respects from the historically approved common-law approach. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va. 1992). First, unlike in the historical punitive damages cases, the tort for which punitive damages were awarded below was not a dignitary tort that inflicted

personal humiliation and insult or that caused any physical harm; it was a business tort—slander of title to a piece of property.

Second, the damages that result from slander of title are fully compensable under West Virginia law. The punitive damages award therefore cannot be justified, as punitive damages historically were in part, on the basis that a clear, but intangible, injury otherwise would go uncompensated. West Virginia law even permitted the plaintiff below to recover as compensatory damages the $19,000 in attorneys' fees incurred by him in defending against the suit that arose out of the allegedly false quitclaim deed that constituted the slander of title.

Third, unlike in historical punitive damages cases, the punitive damages here were awarded not against the actual wrong-doing individuals, but against the corporation that employed them. Also, that corporation did not fall within the historical exception of being a common carrier or public utility with a special obligation to protect the public safety.

Fourth, the size of the punitive damages award, $10 million, was 10,000 times the maximum criminal fine for fraud in West Virginia. *See* W. Va. Code § 61-3C-4 (Michie 1992) (maximum fine of $10,000 for crime of fraud). Unlike historical punitive damages awards, therefore, it was far out of the range of criminal fines for similar conduct.

Fifth, the Supreme Court of Appeals of West Virginia upheld the punitive damages award in part "because appellant and its agents and servants failed to conduct themselves as gentlemen" (419 S.E.2d at 875) and in part because that court perceived the conduct as having been not merely "really stupid," but "really mean." *Id.* at 887-90. The court also expressly recognized that, although punitive damages originally "were awarded only to deter malicious and mean-spirited conduct," their use today "has grown to include not only mean-spirited conduct, but also extremely negligent conduct that is likely

to cause serious harm." *Id.* at 887. West Virginia thus now employs a "really stupid/really mean" test and a "gentlemanliness" test, both of which were unheard of at common law and encompass a state of mind or culpability that historically did not give rise to punitive damages.

Sixth, West Virginia no longer limits the use of punitive damages for the purpose of directly deterring those who otherwise would inflict insult and physical harm. It instead permits such punishment to "increase[] the likelihood that settlement decisions will be made by upper management employees . . . ." *Id.* at 888. Thus, the purpose of punitive damages now is to effect indirect changes in conduct, and, specifically, to force corporate defendants to settle lawsuits.

Seventh, West Virginia now evaluates the propriety of the size of a particular punitive damages award for a particular wrongful act not on the basis of the harm that the defendant's act caused or threatened to cause, but on the basis of the cumulative harm that "[t]he type" of action "could potentially cause . . . to other victims" if repeated on numerous occasions in the future. *Id.* at 889.

Eighth, West Virginia now allows juries and courts to determine the appropriate size of a punitive damages award not on the basis of the wealth of the individual who committed the alleged wrong, and not even on the basis of the wealth of the company that employs that individual, but on the basis of the wealth of a division of the company that owns the company that employs the individual, even though that division's assets were generated by more than a dozen separate corporate entities. *Id.* at 890. West Virginia thus presumes, in punitive damages proceedings only, that the corporate veil is pierced. West Virginia's modern theory is that it "is the pocketbook of [the parent corporation] that the jury verdict must reach," without consideration of what devastation might be wrought on the actual defendant company by a punitive award based on a percentage of the wealth of a much larger parent company. *Id.* at 890.

3. *Punitive Damages Proceedings in Other States Depart Significantly from the Common-Law Approach*

How this Court treats West Virginia's departures from the common-law approach will provide guidance to other jurisdictions. That is of considerable importance because substantial departures from the historical common-law approach to punitive damages are not unique to West Virginia.

In the last 30 years, most states have abandoned the inveterate rule against allowing punitive damages for breach of contract and now imply a "covenant of good faith" into insurance contracts and award punitive damages for "bad-faith breach" of the covenant. *See Haslip*, 111 S. Ct. at 1066 (O'Connor, J., dissenting); *Punitive Damages: A Constructive Examination*, Report of the Special Committee on Punitive Damages of the American Bar Association Section on Litigation 5-2, 5-3 (1986). In addition, "a significant minority of jurisdictions have extended the action to other kinds of contract cases." *Id.* at 5-4. *See generally* Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 Ind. L. Rev. 668 (1975).

Furthermore, although punitive damages historically were justified in part on the ground that they were needed to fill in the gap that existed because compensatory damages were not allowed for various intangible harms (*see* p. 8, *supra*), in the last few decades every jurisdiction has greatly expanded the category of intangible harms for which compensatory damages are awarded. Modern damages law permits compensatory damages, for example, for pain and suffering (*see, e.g., Downie v. United States Lines Co.*, 359 F.2d 344, 347 (3d Cir.), *cert. denied*, 385 U.S. 897 (1966)); humiliation (*see, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)); loss of consortium (*see, e.g., Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980)); emotional trauma by a plaintiff not in the zone of danger (*see, e.g., Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912,

69 Cal. Rptr. 72 (1968)); loss of parental society and guidance (*see, e.g., Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981)); and loss of a child's counsel and advice to a parent (*see, e.g., Green v. Bittner*, 85 N.J. 1, 424 A.2d 210 (1980)), to name but a few.

Also unlike the historical common-law approach is the modern infliction of punitive damages not on the individuals who actually inflicted the harm, but on corporations who employ those individuals. Whereas punitive damages historically were awarded almost exclusively against individuals who committed insult torts such as slander, seduction, assault, and battery, today's awards in all punitive-damages jurisdictions typically are against corporations and are often based on acts that (1) involved no "insult," (2) were not aimed at the plaintiff, (3) were not intended to cause harm, and (4) were the acts of low-level corporate employees. *See, e.g., Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991) (reversing judgment holding corporate trucking company liable for $100,000 in punitive damages when one of its drivers stopped his truck on side of road to use a roadside telephone in a hard rain, and plaintiff drove his car into back of the truck.)

4. *The Numerous Departures from the Common-Law Approach to Punitive Damages Have Upset the Historically Approved Balance Between the Respective Interests of Defendants and the States*

These and other modern departures, in West Virginia and elsewhere, from the historical common-law approach to punitive damages have significantly upset the common-law balance between punitive-damages defendants' interest in rational decisionmaking and the states' interest in appropriate deterrence and retribution. When punitive damages were awarded for clear-cut personal torts such as assault, battery, seduction, and false imprisonment, there was a relatively low risk that the jury would erroneously attribute to the tortfeasor an intent to do wrong. Today, on the other hand, the risk is considerably greater

that a jury will err in trying to decide whether a business person acted in "bad faith" in interpreting a complex insurance contract or other business contract.

In product liability cases, which were unheard of at common law and came into vogue in 1964 with the promulgation of section 402A of the Restatement (Second) of Torts, the risk is even greater that juries will err in trying to decide whether punitive damages should be awarded. This is especially so because. in determining whether a product is "defective," juries in most jurisdictions are told to conduct a complex "risk-utility balance" of factors:

> These factors include the availability of substitute products, the manufacturer's ability to eliminate some of the risks associated with the product without adversely affecting the usefulness or cost of the product, and the expectations of the ordinary consumer.

Carter v. Massey-Ferguson, Inc., 716 F.2d 344, 348 (5th Cir. 1983); *see also Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 746 (Tex. 1980) ("evidence of the actual use of, or capacity to use, safer alternatives is relevant"). This requires a jury to try to comprehend and reanalyze arcane engineering, scientific, and probabilistic determinations far more difficult and judgmental than the common historical issues such as whether a defendant intended to shoot at the plaintiff or acted knowingly in seducing the plaintiff's spouse. Moreover, the more carefully and explicitly a manufacturer tries to conduct and record the detailed risk-utility analysis required to make a product that is nondefective under product liability law, the more likely it is that, if the jury later disagrees with the manufacturer's judgment. the jury also will conclude that the manufacturer acted in a calculated manner with "conscious indifference to the rights or welfare of [others]" and will award punitive damages. *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex. 1981).

Indeed, modern plaintiffs' lawyers regularly rely on the model of the fully rational, carefully calculating corporation in their attempts to persuade juries to award punitive damages. Plaintiffs' lawyers regularly argue that punitive damages should be awarded against corporate manufacturers precisely because corporations make decisions solely on the basis of risk-benefit calculations. One of the country's most prominent plaintiffs' lawyers argues, for example, that a corporation is

> something that does not care or love or have babies of its own—something that does not even breathe. And this "non-breather," shall we call it, had a special kind of blood—it was green, and it was made of money. It sustained itself on money, large amounts of money. It ate money and craved money, more money. More and more money. It lived for money and dreamed of money and even excreted money . . . . Then one day this corporation, this non-breather, discovered a new way to obtain large amounts of money very easily. Do you know what it did?

Spence, *How to Make a Complex Case Come Alive for a Jury*, 72 A.B.A. J., Apr. 1, 1986, at 62, 66.

The risk of arbitrary and discriminatory punishment has further increased as a result of the modern focus on corporate defendants, rather than on the individuals who actually committed the harmful acts. The increased risk derives from the relative ease of requiring a "non-breather" entity to pay a large sum of money and from the prejudice spawned by the relatively much greater assets of corporations, by the out-of-state location of many corporate defendants' headquarters, and by the general modern antipathy for corporations. Social science research now shows that the public holds corporations to "increasingly, and perhaps unrealistically, high standards," believes that "[e]ven if a corporation has unintentionally produced a defective product, . . . the company should still be punished," and generally is "cyn-

ic[al] about corporate ethics." *Prod. Liab. Law & Strategy*, Vol. XI, no. 3, at 4 (Sept. 1992).[2]

The risk of excessive punishment is still further compounded by the fact that punitive damages today are awarded even though the large gaps in compensatory damages that historically existed no longer exist. The risk of excessive punishment could be alleviated by jury instructions explaining that compensatory-damages dollars have just as much deterrent and retributive force as do punitive-damages dollars and by explaining to juries the basic deterrent and retributive principles that dictate what total award is reasonably necessary to achieve proper deterrence and retribution. But such instructions are not given in West Virginia or elsewhere, and ever-larger punitive awards are added to ever-expanding

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[2] This is not to say that the infliction of punitive damages on a corporate employer for the acts of its employee has no arguably rational basis. *See, e.g. Haslip*, 111 S. Ct. at 1041 ("If an insurer were liable for such damages only upon proof that it was at fault independently, it would have an incentive to minimize oversight of its agents.") Rather, it is simply to say that, however well-intended, such an approach raises the risk that punishment will be arbitrary, discriminatory, or excessive.

In another context, however, this Court has recognized that imposing punitive damages on an employer, rather than on the wrongdoing employee, is not the most effective approach to deterrence. In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the Court held a municipality, as opposed to an individual municipal employee, immune from punitive damages liability under 42 U.S.C. section 1983. The Court clearly indicated its belief that deterrence of violations would be better accomplished by punitive damages awards against the wrongdoing individual:

> Moreover, there is available a more effective means of deterrence. By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations. In our view, this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations by reason of his office.

453 U.S. at 269-70.

compensatory awards never remotely approached at common law.

The modern expansion of compensatory damages has in several ways greatly reduced the deterrent and punishment justifications for punitive damages. As has long been recognized, compensatory damages also deter and punish undesirable behavior. *See* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1173-74 (1931). Accordingly, as the certainty, number, and size of compensatory damages for tortious conduct has increased, so has their deterrent and punishment force, thereby making it less frequently justifiable to supplement them with punitive damages.

The deterrent and punitive functions of compensatory damages have even further increased as a result of modern developments in tort law, resulting in still further reductions in the historical justification for punitive damages in most circumstances. New causes of action, such as strict liability in tort, have been recognized. *See, e.g., McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 790 (Tex. 1967) (recognizing strict liability in tort as a cause of action in Texas). The range of potential plaintiffs has grown. *See, e.g., Darryl v. Ford Motor Co.*, 440 S.W.2d 630, 633 (Tex. 1969) (extending strict liability to cover third parties). Immunities have been eliminated or narrowed. *See, e.g., Price v. Price*, 732 S.W.2d 316, 319 (Tex. 1987) (abolishing interspousal immunity); Tex. Civ. Prac. & Rem. Code Ann. § 101.025 (West 1993) (waiving governmental immunity for certain causes of action). The likelihood that those responsible for causing injury will be liable for compensatory damages has increased considerably as a result of modern evidence rules such as those admitting evidence of subsequent remedial measures and greatly expanded expert testimony, as well as modern procedural devices such as class actions, liberal joinder of claims, liberal joinder of parties, and liberal discovery. *See, e.g.*, Tex. R. Civ. P. 39, 40, 42, 48, 51, 166b through 169, and 187 through 215.

Modern manufacturers face other powerful deterrent forces created by laws that did not exist when punitive damages were applied either at common law or at the start of this century. For example regulatory agencies now contribute to deterrence by adding to the costs manufacturers can expect to incur if they sell defective products. Various federal and state administrative agencies regulating thousands of products have the power to require recalls and warnings and to impose civil penalties.

These factors, and many others, indicate that punitive damages today are justifiable in far fewer instances and that the risk of arbitrary, discriminatory, or excessive punitive awards needs to be protected against more closely than in earlier times.

The novel features introduced below by the Supreme Court of Appeals of West Virginia increase the risk of arbitrary, discriminatory, and erroneous punishment even more than in other jurisdictions. Thus, for example, by allowing the propriety of a punitive damages award to turn on whether a corporate defendant's employees "failed to conduct themselves as gentlemen" or were "really mean," rather than "really stupid," the court both reduced to a new low level—ungentlemanliness—the culpability that can support a punitive award and introduced a new high level of ambiguity and uncertainty as to what justifies punishment in the eyes of the law.[3]

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[3] In addition, the court's contention that much higher punitive damages awards are needed to deter "really mean" defendants than are needed to deter "really stupid" defendants is illogical, especially in a commrcial context such as this case. Presumably, a "really stupid" person is one whose rational thought processes are substantially below the average and who therefore will not "get the message" from a small punitive award. A "really mean" person, on the other hand, presumably is one who, in a commercial context, carefully and coldly calculates what type of conduct, tortious or not, will maximize his own profits. As long as the law assumes that any ill-gotten gain will be taken from him in the form of compensatory damages, no punitive damages at all will be needed to deter him. If punitive damages are needed, it is only to offset the probability that compensatory damages might not be awarded, or might not be large enough to deprive him of his profit. Larger punitive damages

In addition, by making it a primary purpose of punitive damages to force settlement decisions to "be made by upper management employees," the West Virginia court invites juries to punish a corporation on the basis of the number of employees and decisionmaking layers it has. Under that theory, presumably, the lower the level of the employee who committed the wrong, the greater the punitive damages should be in order to force the issue up through more layers of management.

By holding that punitive damages should now be used to force defendants to settle lawsuits, the West Virginia court also introduces a punitive damages purpose that necessarily will have a chilling effect on defendants' exercise of their right to access to the courts, to argue novel theories of law, and to argue for changes in existing law. It also will turn every punitive damages case into one that requires a trial of the parties' settlement efforts, contrary to common law punitive damages proceedings and contrary to the general rule against the admissibility of settlement negotiations. *See, e.g.*, Fed. R. Evid. 408; W. Va. R. Evid. 408.

West Virginia increases the risk of excessive punishment still further by evaluating the propriety of a punitive award not on the basis of the harm that the defendant's act caused or threatened to cause, but on the basis of the cumulative harm that "[t]he type" of action "could potentially cause . . . to the other victims" if repeated in the future. That approach completely frees the evaluation from its historical and logical mooring—what is needed to deter a single such act—and encourages juries to punish in advance for an undetermined aggregation of possible future acts.

West Virginia's most harmful departure from the historical approach, however, is its allowing the size of a punitive award to turn not on the basis of the financial

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may be necessary for the "really mean" perpetrator of a personal tort, such as assault, battery, or slander, who gains psychic satisfaction, rather than monetary profit, from committing the wrong, but that was not the situation in this case.

gain realized from the specific misconduct of the specific defendant, but on the basis of the overall wealth of a parent company.

The financial evidence thus admitted in West Virginia is not limited to *relevant* financial information. Instead, the evidence allowed can be the entire net worth of a parent company and its subsidiaries. That number is likely to include assets derived from and dedicated to numerous other business activities of the defendant. That number also often includes assets derived from activities in other states and other countries, in many of which the conduct in issue might not even be tortious, criminal, or otherwise wrongful. Thus, the jury is implicitly instructed to base the severity of punishment in large part on assets derived from the defendant's activities that are considered nondefective and societally beneficial.

In addition, the net worth evidence in West Virginia is not admitted to *limit* the punishment so as to prevent bankruptcy. Instead, it is admitted to *increase* the punishment based on the defendant's status.

The prejudicial effect of evidence of the wealth of a large organization can hardly be overstated. As this Court observed in explaining why punitive damages should not be permitted against a municipality, "The unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981).

That same prejudicial impact is even more likely to attend evidence of the wealth of a company whose annual income greatly exceeds the income of a vast multitude of municipalities. Jurors who vote to award huge damages against their own municipality are likely to be aware that they themselves will have to shoulder a share of the taxes needed to pay the judgment, and they may temper their verdict accordingly; but most jurors who vote to award huge sums against a private manufacturer are likely to believe that, unless they buy the product in issue, they will not incur any of the direct cost of the

juudgment.[4] Even further, a jury's inclination to redistribute wealth is likely to be exacerbated by knowledge that the wealth will be redistributed from an out-of-state or foreign corporation to a local citizen.

The unacceptability of these prejudicial effects of net-worth evidence is sharpened by the now widely recognized fact that a defendant's net worth is irrelevant to the determination of the appropriate punishment under any recognized theory of deterrence or retribution. *See, e.g.*, Abraham & Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. Legal Studies 415 (1989); Dobbs, *Ending Punishment in 'Punitive' Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831, 870-85 (1989); Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 950-52 (1989).

The increased risk of arbitrary, discriminatory, and excessive punitive damages awards caused by all of these departures from the historical approach is not just theoretical. As researchers for the RAND Institute for Civil Justice have found, "Corporate defendants are in fact more likely than individuals or public agencies to be the target of [punitive damages] awards," and "[p]unitive awards against businesses were far larger than those against individuals in both personal injury and business/contract cases." M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings iii*, 50 (1987). "Juries also award more money where the defendants are institutions or organizations rather than individuals—the 'deep pocket' effect . . . . [W]e can detect a separate, statistically independent effect for deep-pocket defendants, even in cases that do not involve products or malpractice." D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 21 (1987).

[4] Of course, to the considerable extent that unpredictable, huge punitive awards against some defendants cause all businesses to increase their insurance, their reserves, and their prices, all consumers, including jurors, indirectly pay for unjustified punitive awards.

Further proof of the effect of the many departures from the common-law approach is that the frequency and size of punitive damages awards has skyrocketed as these departures have occurred. An analysis of jury verdicts in the United States, prepared by the RAND Institute for Civil Justice, shows the growth in the average award in the types of tort litigation that manufacturers commonly face "has been truly explosive, reflecting increases ranging from 200 to more than 1,000 percent" from the period 1960-1964 to the period 1980-1984. D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 18 (1987). Indeed, a recent study funded by plaintiffs' personal injury lawyers, in an attempt to show the *absence* of such an explosion, revealed that the frequency of punitive damages awards in product liability cases alone mushroomed by almost *2000 percent* between 1965 and 1990. *See Demystifying Punitive Damages in Products Liability Cases* 25 (1991) (7 awards for 1960-1965; 151 awards for 1985-1990).

Before 1970 there was only one reported appellate court decision in the entire United States upholding an award of punitive damages in a product liability case—an award of $250,000. *See Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). Today, hardly a month goes by *in the State of Texas alone* without a multi-million dollar punitive damages verdict against some company.[5]

[5] *See, e.g.*, the following examples of the many recent multi-million-dollar punitive damages verdicts under Texas law: *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) (applying Texas law) ($6.1 million punitive damages award affirmed); *General Chem. Corp. v. De la Lastra*, 815 S.W.2d 750 (Tex. Ct. App. 1991) ($30 million punitive damages verdict affirmed); *State Farm Mut. Auto. Ins. Co. v. Zubiate*, 808 S.W.2d 590 (Tex. Ct. App. 1991) ($15 million punitive damages award reduced to $660,000); *Havner v. Merrell Dow Pharmaceuticals Inc.*, 19 Prod. Safety &

C. Unlike the Alabama Punitive Damages Approach Approved in *Haslip*, the West Virginia Approach Fails to Provide Procedural Safeguards Necessary to Cure the Imbalance Caused by the Modern Departures from the Common-Law Approach

In *Haslip* this Court canvassed the combination of procedural safeguards provided by Alabama to ensure that "discretion is exercised within reasonable constraints," that there is "meaningful and adequate review by the trial court," and that appellate review "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." 111 S. Ct. at 1044, 1045. That multi-level combination of safeguards was reasonably sufficient to restore the historical balance between defendants' interest in rational decisionmaking and the states' interest in appropriate deterrence and retribution. In short, those safeguards "make[] certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." 111 S. Ct. at 1045.

Liab. Rep. (BNA) 1134 (Tex. Dist. Ct. Oct. 3, 1991) ($30 million punitive damages award); *Shears v. Caterpillar*, 19 Prod. Safety & Liab. Rep. (BNA) 1050 (Tex. Dist. Ct. Sept. 9, 1991) ($5.85 million punitive damages award); *Lopez v. Westinghouse Elec. Corp.*, 19 Prod. Safety & Liab. Rep. (BNA) 862 (Tex. Dist. Ct. July 31, 1991) ($10 million punitive damages verdict); *Bliskey v. Berry Property Mgt., Inc.*, 34 A.T.L.A. Law Reporter 354 (Tex. Dist. Ct. May 16, 1991) ($5 million punitive damages award); *Simmons v. State Farm Fire & Casualty Co.*, 34 A.T.L.A. Law Reporter 306 (Tex. Dist. Ct. Mar. 1, 1991) ($2 million punitive damages award); *Lemon v. Missouri Pac. R.R.*, 34 A.T.L.A. Law Reporter 229 (Tex. Dist. Ct. Feb. 7, 1991) ($10 million punitive damages award); *Flores v. Kings Park Apartments*, 34 A.T.L.A. Law Reporter 190 (Tex. Dist. Ct. Nov. 9, 1990) (awarding 10 test plaintiffs approximately $5.25 million in punitive damages); *Ward v. Exxon Corp.*, Texas Lawyer, No. 26, 1990, p. 16 (Tex. Dist. Ct. Nov. 5, 1990) ($5 million punitive damages award); *Parker & Parkley Petroleum Co. v. Dresser Indus.*, Texas Lawyer, Dec. 10, 1990, p. 28 (D. Tex. Oct. 26, 1990) ($100 million punitive damages award); *Waite v. Dean Witter Reynolds, Inc.*, 34 A.T.L.A. Law Reporter 66 (Tex. Dist. Ct. Aug. 3, 1990) ($16 million punitive damages award).

Although West Virginia, as shown above, has chosen to increase beyond historical levels the risk of arbitrary, discriminatory, and excessive punishments in more ways than had Alabama, it has failed to put into place either Alabama's balancing safeguards or their substantial equivalent. As a result, West Virginia's system has significantly upset the historical balance that due process requires to be preserved.

Central to *Haslip*'s finding of the required balance was the Alabama safeguard, at the jury trial level, requiring that "[a]ny evidence of [the defendant's] wealth was excluded from the trial . . . ." 111 S. Ct. at 1044. The Court emphasized that, because of that rule, "the fact finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.* at 1045.

In West Virginia, exactly the opposite is true. Not only is the *defendant's* wealth placed before the jury, but the *parent corporation's* wealth is placed before the jury. Not only is that prejuudicial evidence placed before the jury, but the jury is told that it "*should* take into consideration . . . the wealth of the perpetrator." Not only is the jury directed to consider such wealth, but it is misinformed that "to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances." (Respondents' Brief in Opposition to Petition for a Writ of Certiorari, Appendix B (emphasis added).)

Also central to *Haslip*'s finding of the required balance was the Alabama safeguard, at the level of trial-court review, requiring trial courts "to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." 111 S. Ct. at 1044. This requirement not only ensured that trial court review would actually occur, but also enabled appellate courts to scrutinize the trial court's reasoning and thereby to conduct meaningful appellate

review. Several factors were specified as "appropriate for the trial court's consideration," including (1) the "culpability of the defendant's conduct," (2) the "desirability of discouraging others from similar conduct," (3) the "impact upon the parties," and (4) "other factors, such as the impact on innocent third parties." 111 S. Ct. at 1044 (quoting *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986)).

In West Virginia, trial-court review does not provide these safeguards. The trial court is not required to, and in this case did not, reflect in the record its reasons for refusing to disturb a punitive damages verdict. This omission renders impossible any appellate review of the trial court's actual reasoning. Also unlike Alabama, West Virginia has not explicitly required its trial courts to consider the factors specified in *Haslip*.

West Virginia's current safeguards in punitive damages proceedings also fall short of those in *Haslip* at the level of appellate review. *Haslip* plainly reveals this Court's perception that detailed, objective, appellate review of the reasonableness of punitive damages awards played the most significant role in the "panoply of Alabama's procedural protections." 111 S. Ct. at 1046. As shown above, however, the Supreme Court of Appeals of West Virginia instead introduced into its appellate review factors such as "gentlemanliness," "really mean," and "really stupid" that increase, rather than guard against, the risk of arbitrary, discriminatory, and excessive punishments.

II. DUE PROCESS REQUIRES THAT WEST VIRGINIA PROVIDE PROCEDURAL SAFEGUARDS AT LEAST EQUIVALENT TO THOSE APPROVED IN *HASLIP* IN ORDER TO RESTORE THE HISTORICALLY APPROVED BALANCE BETWEEN DEFENDANTS' INTEREST IN RATIONAL DECISIONMAKING AND THE STATES' INTEREST IN APPROPRIATE PUNISHMENT

As shown above (*see* pp. 10-12, *supra*), the ways in which West Virginia has deviated from the historically

approved common-law approach to punitive damages far outnumber the ways in which Alabama and most other jurisdictions have done so. As a result, West Virginia has greatly increased the risk of arbitrary, discriminatory, and excessive punishment. As also shown above (see pp. 24-26, *supra*), West Virginia has failed to provide several of the procedural safeguards that Alabama provides. West Virginia thereby has substantially upset the historically approved balance between defendants' interest in rational decisionmaking and the states' interest in appropriate deterrence and retribution.

Although the due process clause does not dictate the particular procedural safeguards that must be provided to restore within reasonable bounds the required balance, either the Alabama safeguards approved in *Haslip* as adequate or their substantial equivalent are the minimum needed to offset West Virginia's departures from the historical approach to punitive damages. Those safeguards —especially the exclusion of evidence of a defendant's wealth, the requirement that trial courts "reflect in the record the reasons for . . . refusing to [interfere]" with a punitive damages verdict, and consideration of specified factors by reviewing courts—fall well within the framework of *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), in that they (1) help to protect defendants' private interest in protecting their property against wrongful deprivation; (2) reduce the risk that West Virginia's departures from the common-law approach to punitive damages will wrongly impair that private interest; and (3) reduce the risk in a way that imposes no significant burden on the state and that does not at all impair the state's interest in achieving its legitimate purpose of imposing "punitive damages [that] are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Haslip*, 111 S. Ct. at 1045.

In addition, because West Virginia's departures from the historically approved balance are so much greater than were Alabama's, something more is needed to re-

store the required balance. In *Haslip* this Court recognized that "[t]here is much to be said in favor of a State's requiring, as many do, a standard of 'clear and convincing evidence' or, even, 'beyond a reasonable doubt,' as in the criminal context." 111 S. Ct. at 1046 n.11 (citations omitted). The Court concluded that due process did not require such a standard *in the Alabama system* because "the lesser standard prevailing in Alabama—'reasonably satisfied from the evidence'—*when buttressed, as it is, by the procedural and substantive protections outlined above*, is constitutionally sufficient." *Id.* (emphasis added). Because West Virginia's system is not buttressed by Alabama's panoply of modern procedural and substantive protections, and instead severely undermines numerous historical protections preserved by Alabama, the "clear and convincing evidence" standard, or an equally effective alternative safeguard, appears to be needed to restore the required balance in West Virginia.

While not dictating exactly which safeguards West Virginia and other states must provide to meet due process, this Court can provide guidance by suggesting additional safeguards that would tend to restore the required balance in a manner consistent with the three-pronged *Mathews v. Eldridge* evaluations. Such safeguards include the following:

Jury Proceedings

1. The defendant in a punitive damages trial should have the right, upon motion, to a bifurcated trial in which the issues of whether and in what amount punitive damages should be awarded are tried only after the jury finds liability on the merits. *See Haslip*, 111 S. Ct. at 1064 (O'Connor, J., dissenting). This would enable the trial courts to give more detailed punitive damages instructions, and enable parties to introduce evidence relevant only to the punitive damage issues, without unduly increasing both the risk of prejudice and the length of every trial in which punitive damages are sought.

2. Evidence of a defendant's financial information should be limited to evidence of what monetary gain, if any, the defendant realized by engaging in the allegedly tortious conduct in lieu of the alternative conduct that the plaintiff advocates. In particular, evidence of net worth, total assets, or total annual income should be inadmissible as evidence to increase the appropriate amount of punitive damages. Net worth should be considered only by the court, and only to protect against excessive awards.

3. The jury should be instructed that society would be harmed by, and that the jury must not award, punitive damages in any amount larger than what is reasonably necessary to serve the legitimate deterrent purpose of punitive damages.

4. The jury should be instructed that it must not allow a defendant's corporate nature, residence, or location of offices, or any other aspect of its status to affect either the decision whether to award punitive damages or the decision as to the amount of punitive damages to award.

5. The jury should be instructed that the state's legitimate purposes of deterrence and punishment are served equally by dollars awarded as compensatory damages and by dollars awarded as punitive damages, and that no punitive damages should be awarded if the compensatory damages are adequate to provide the minimum necessary deterrence and retribution.

6. When the tortious conduct is also subject to statutory civil or criminal penalties, the jury should be told of the amounts that the legislature has specified as appropriate for deterrence and punishment of such conduct.

Trial Court Review

1. As in Alabama, trial courts should be required to reflect in the record their reasons for upholding or refusing to uphold a punitive damages verdict.

2. As in Alabama, trial courts should be required to consider the factors listed in *Haslip* as appropriate for judicial review. The parties should be permitted to introduce evidence relevant to those factors in a post-jury-trial evidentiary proceeding. Only in this manner will

defendants be able, as a practical matter, to obtain due consideration of the deterrent effects of criminal sanctions, other punitive damages awards, other compensatory damages awards, and regulatory sanctions, because evidence of that nature could not be shown to a jury without generating prejudice on other issues. *See, e.g.*, Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 295 (1983); Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. Rev. 1158, 1174 (1966).

Appellate Review

1. Appellate courts should be required to determine independently whether the punitive damages award was reasonably necessary to promote the legitimate deterrent and retributive purposes of punitive damages. *See Haslip*, 111 S. Ct. at 1045.

2. Appellate courts should be required to consider the factors listed in *Haslip* as appropriate for judicial review, including evidence introduced in any post-jury-trial evidentiary proceeding before the trial court.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Appeals of West Virginia should be reversed.

Respectfully submitted,

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